METROPLEX BHD & ORS

v.

MORGAN STANLEY EMERGING MARKETS INC & ORS; RHB SAKURA MERCHANT BANKERS BHD & ORS (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-255-2002]
30 NOVEMBER 2004

COMPANY LAW: *Arrangements and reconstructions - Restraining order - Extension of, application for - Whether ought to be granted - Companies Act 1965, s. 176(10A)*

This was the applicants' fifth application *vide* summons in chambers (encl. 82) for a further extension of a restraining order ('RO') dated 22 October 2002. The applicants, which had first defaulted in various debt payment obligations in 2000, had sought the assistance of the Corporate Debt Restructuring Committee ('the CDRC') to restructure their debts in the aggregate sum of RM1.6 billion without any success. In 2002, the applicants withdrew from the CDRC and initiated proceedings under s. 176(10) of the Companies Act 1965 ('the Act'). They obtained the RO on 22 October 2002, and thereafter, the court extended the RO on four occasions during a period of over two years, the most recent being from 15 July 2004 to 22 October 2004. On 19 October 2004, approximately four years after default and over two years after the RO, the applicants proposed a new scheme of arrangement, the October 2004 Proposed Scheme, to their creditors. The main issue requiring consideration was whether the applicants' present application for an extension of the RO ought to be granted.

Held (dismissing the application):

[1] Section 176(10A) of the Act not only provides that an RO may only be granted if there is a proposal for a scheme of compromise which involves creditors representing at least one-half in value of all the creditors, but it also stipulates that an RO may only be extended for a longer period "if and only if" there is a "good reason" to do so. The words "good reason" have been construed by the courts to mean that: (a) a *bona fide* scheme of arrangement is presented, with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits;

(b) the scheme of arrangement presented must not be such that it is bound to fail; and (c) the interest of the creditors, that is, the beneficiaries under the proposed arrangement is safeguarded. Obviously, premised on the above requirements, the applicants submission that this was the last extension of RO requested and that it was only for a period of four months from 22 October 2004 (or only about three months from 30 November 2004 to 21 February 2005) could not *per se* constitute "good reason". Surely, the existence of "good reason" ought to be predicated upon the applicants' *bona fide* conduct towards achieving a feasible detailed scheme of arrangement for presentation to the general body of creditors. It was not feasible if, for example, the scheme to be presented was bound to fail. (p 814 b-f)

[2] On the facts, the applicants do not appear to have a genuine proposed scheme. Clearly, until now there was no compromise or arrangement proposed and the requirements stipulated in s. 76(10A) of the Act had not been met at all. Thus, if the RO were to be extended after two years, it would tantamount to providing unlimited protection to the applicants, especially as they had not even rendered satisfactory statements in the prescribed form as required under s. 176(10A)(c) of the Act in order for the creditors to determine how their affairs and assets had been dealt with whilst the RO prevailed. Even until now, the applicants could only state that only 48.52% of the creditors had agreed to the application for extension and only "some" creditors to the proposed scheme itself whereas s. 176(10A) required approval of at least 50% in value of creditors before the court could grant a restraining order. This showed the unfeasibility of the draft October 2004 Proposed Scheme and it was bound to fail, *a fortiori*, considering that it had been clarified that "some" creditors meant only 21% in value of creditors. It was clear that the applicants would not be in a position to produce a scheme of compromise or arrangement that was viable, reasonable or feasible even if their fifth application to extend the life of the RO to 21 May 2005 were granted. (pp 816 b, d, g-h & 817 b-d)

[3] The applicants' application for an extension of the RO under encl. 82 was dismissed with costs. However, the applicants should have the liberty to apply for a fresh restraining order should they at any time hereafter be in the position to present a *bona fide* viable or feasible scheme of compromise, provided that such fresh application was served on the present respondents and interveners. (p 817 e)

[Order accordingly.]

Case(s) referred to:

Re Kuala Lumpur Industries [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86 HC ***(refd)***

Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC ***(refd)***

Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd [1993] 2 CLJ 677 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 176(10), (10A)

Rules of the High Court 1980, O. 15 r. 6(2)(b)(ii)

For the applicants - Mohd Ariff Yusof (Cindy Goh with him); M/s Cheang & Ariff

For the 1st respondent - RS Nathan (Mohd Izral Khairy with him); M/s Shearn Delamore & Co

For the 2nd respondent/applicant in encl 102 - Dahlia Lee (SY Lee with her); M/s Shook Lin & Bok

For the 3rd respondent/applicant in encl 109 - Yoong Sin Min (Wong Mae Foon with her); M/s Shook Lin & Bok

For the interveners/applicants in encl 111 - Tommy Thomas (Alan Gomez with him); M/s Tommy Thomas & Co

Reported by Suresh Nathan

JUDGMENT

Vincent Ng J:

It is consistent with judicial prudence, and indeed with the current mood for transparency, that a judge should endeavour to promptly render at least the crux (however skimpy) of the rationale for his decision even should he be so severely pressed for time, especially where the subject matter involves an immense sum – the gross debt in the instant case is RM1.6 billion; such prudence, so as to obviate any speculation in financial circles that the judge may have made a peculiar or controversial decision at odds with a reasoning mind. Before me is the applicants' (the Metroplex Group) fifth application *vide* summons in chambers (encl. 82) for a further extension of the Restraining Order (RO) dated 22 October 2002. Following encl. 82 various creditors of the applicants filed applications under O. 15 r. 6(2)(b)(ii) of the Rules of the High Court 1980, *vide* encls. 102, 109, 111 (and under encls. 77 and 81 earlier) to intervene in encl. 82 and to oppose the extension of the RO. By consent of the applicants in encl. 82, respondents 3 and 4, *vide* encls. 102 and 109, were granted leave to intervene in and to participate in the arguments in encl. 82. Enclosure 82 was also opposed by the above respondents 1 and 2, who were earlier allowed by consent to intervene under encls. 77 and 81 respectively. Also allowed, by consent, to intervene were ten of the eleven interveners *vide* encl. 111 (as intervener number 4 withdrew upon commencement of the hearing). The applicants in encl. 111 are the applicants'

bankers and secured creditors, who also prayed (in prayer 4 of encl. 111) for the setting aside of the original RO dated 22 October 2002 and its subsequent renewals. Ranged against the applicants at the hearing (which was adjourned into open court) was a team of about eleven lawyers who represented the respondents and interveners in encls. 77, 81, 102, 109 and 111.

The undisputed facts in the matter are, *inter alia*:

(a) the applicants first defaulted in various debt payment obligations in 2000;

(b) between 2000 and 2002, the applicants sought the assistance of the Corporate Debt Restructuring Committee (CDRC) to restructure their debts in the aggregate sum of RM1.6 billion – but without any success;

(c) in 2002, the applicants withdrew from the CDRC process and initiated proceedings under s. 176(10) of the Companies Act 1965 (the Act);

(d) the applicants obtained the Restraining Order on 22 October 2002 – thereafter the court extended the RO on 4 occasions during a period of over two years. The most recent extension was from 15 July 2004 to 22 October 2004; and

(e) on 19 October 2004, approximately four years after default and over two years after the RO, the applicants proposed a new scheme of arrangement (the October 2004 Proposed Scheme) to its creditors (the Scheme Creditors).

As a decision on the matter now before me would have to be made in accordance with the law, it is appropriate to set out the following relevant statutory provisions applicable to encl. 82 to extend the RO. Section 176(10A) states that:

> (10A) The Court may grant a restraining order under subsection (10) to a company **for a period of not more than ninety days or such longer period** as the Court may **for good reason** allow **if and only if**:
>
> (a) it is satisfied that **there is a proposal for a scheme of compromise** or arrangement **between the company and its creditors** or any class of creditors **representing at least one-half in value of all the creditors**;
>
> (b) the restraining order is **necessary to enable** the company and its creditors **to formalise the scheme of compromise** or arrangement for the approval of the creditors or members pursuant to subsection (1);
>
> (c) **a statement in the prescribed form** as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application; **and**

(d) it approves the person nominated by a majority of the creditors in the application by the company under subsection (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum and articles of the company, appoints the person to act as a director. (emphasis added)

Clearly, s. 176(10A) not only provides that an RO may only be granted if there is a proposal for a scheme of compromise which involve creditors representing at least one-half in value of all the creditors, but it also stipulates that an RO may only be extended for a longer period 'if and only if' there is a 'good reason' to do so. The words 'good reason' have been construed by the courts to mean that:

(a) a *bona fide* scheme of arrangement is presented, with sufficient details provided to the creditors to enable them to make informed decisions as to its feasibility and merits (see *Re Kuala Lumpur Industries* [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86);

(b) the scheme of arrangement presented must not be such that it is bound to fail (see *Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd* [1993] 2 CLJ 677); and

(c) the interest of creditors, that is, the beneficiaries under the proposed arrangement is safeguarded (see *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106).

Obviously, premised on the above requirements, the applicants' submission that this is the last extension of RO requested and that it is only for a period of four months from 22 October 2004 (or only about three months from 30 November 2004 to 21 February 2005) could not *per se* constitute 'good reason'. Surely, the existence of 'good reason' ought to be predicated upon the applicants' *bona fide* conduct towards achieving a feasible detailed scheme of arrangement for presentation to the general body of creditors. And, it is not feasible if, for example, the scheme to be presented is bound to fail.

The highest water mark of the applicants' case that 'good reason' has been shown could be gleaned from their counsel's first submission and submission in reply. In para. 4 of the first submission counsel listed out the following "major progress in relation to the proposed scheme":

"4.1The **preparation** of the draft Explanatory Statement (ES);

4.2 The incorporation of **comments** by Scheme Creditors;

4.3 The **appointment** of Independent Financial Advisor and Independent Legal Counsel for the Scheme Creditors;

4.4 The **decision to sell** Putra Place which will be a major source of repayment to the Scheme Creditors;

4.5 A reputable valuer, **Jones Lang Wootton**, has also been **appointed** by the Applicants **to value the properties** owned by the Applicants; and

4.6 **Many meetings held** with Scheme Creditors on the Proposed SOA.

The above desultory statements must be read in conjunction with the damning piece of evidence disclosed in para. 6 of the submission in reply where counsel also stated that: "To date 48.52% of the total scheme creditors have reverted in writing stating that they are agreeable to the present application (for extension) and some to the proposed scheme itself." Now, on point of clarification, Encik Arif explained to this court that the word 'some' above meant that only 21% in value of the total scheme creditors have agreed to the proposed scheme itself. In my considered view, the above underscored words in para. 4.1 to 4.6 reveals that the applicants are, after 25 months from the granting of the RO, only now still at the initial meager stages of attempting to achieve a feasible "scheme of compromise or arrangement between the company and its creditor". And, militating against the aforesaid statutory requirements, para. 6 of counsel's submission acknowledges that much less than 50% in value (being 21% in value) of total scheme creditors have agreed to the proposed scheme.

The applicants said that they have held 'many meetings' but yet after over two years they have not achieved any reasonable or viable result in terms of progress towards finalising the scheme of arrangement. It is beyond question that any draft scheme presented must contain sufficient particulars for the scheme creditors to consider its viability. For instance, I note that a key asset of Metroplex, the sale of which is pivotal to the October 2004 Revised Scheme, is the Proposed Putra Place property disposal. Yet, no valuable information on Putra Place has yet been provided to the scheme creditors. In this regard, it is observed that only on 25 October 2004, after the 5th application for extension was filed, was Messrs Jones Lang Wootton consulted to provide a valuation of the assets of the Metroplex Group. The Metroplex Group had at least two years (with 4 extensions of the Restraining Order) to provide that valuation but had failed to do so, thus evincing unreasonable delay on the part of the applicants. The applicants are now seeking a period of less than three months to bring this Proposed Scheme of Arrangement to fruition. As the offer of settlement to all the creditors under the Scheme, apart from the proceeds of sale of Putra Place, consists of issuance of bonds and loan stocks, approvals from the relevant authorities (Securities Commission, Bank Negara) would be required. I find it improbable that such approvals will be forthcoming within three months if granted. Furthermore, I observe that in exh.

'MB14' of the applicants' supporting affidavit, the applicants have not even factored into the schedule for convening a meeting, the requirement for seeking approvals. Surely, it would not be feasible to seek approvals only after creditors have agreed at the meeting, as a rejection of the Scheme by the authorities post approval would render the whole exercise futile. Therefore, upon the above considerations, this court could only conclude that the applicants do not appear to have a genuine proposed scheme.

Thus, for more than two years since obtaining the RO, on 22 October 2002, the applicants have no scheme which can be voted on by the creditors. There is no statutory creditors' meeting ready to be convened as required under s. 176 of the Companies Act 1965, nor has an order been applied for to convene such meeting. It is only when "such compromise or arrangement has been proposed between the company and its creditors" will the court grant an order to restrain further proceedings against the company. Clearly, until now there is no such compromise or arrangement proposed and the requirements stipulated in the subsection (10A) have not been met at all.

On the law on extensions of an RO, I would hold that all the provisions of s. 176(10A) must be met afresh (which the applicants have not done) in order to empower the court to grant any extension of the RO after the first RO. My reasons are twofold. The peculiar and unusually strong wording in s. 176(10A) which stipulates that the 90 days period may extended for "such longer period … for good reason if and only if" conditions (a) to (d) have been satisfied. And, in my view, the legislative scheme of specifically stipulating, in imperative or peremtorarily conditional language, as encompassed in the words "if and only if" in the new subsection (10A) of s. 176 surely mandates, *inter alia,* the continued prevalence of condition (10A)(a) – that is, the consensual representation in the scheme of at least one half in value of all the company's creditors – as well as a re compliance with the condition (10A)(c) of the subsection, before the court could exercise its discretion to extend the Restraining Order. Furthermore, for such extension, the court has to be satisfied that the other conditions in 10A are also met and that there is reasonable progress towards the achievement of a viable and feasible creditors scheme of arrangement. Thus, if this court is to extend same after over two years, in the teeth of such adverse circumstances in the instant case, it would be tantamount to providing unlimited protection to the applicants, especially as they have not even rendered satisfactory statements in the prescribed form as required under s. 176(10A)(c) in order for the creditors to determine how their affairs and assets have been dealt with whilst the RO prevailed. Though the applicants had said that the proceeds of sale of Tawakal and Infra Sari had been factored into the annual report of the first applicant yet they have conceded that such proceeds were not factored into the October 2004 proposed

scheme. They also asserted that "indicative valuation of the properties is estimated to be completed by the end of November by Jones Lang Wootton", yet, we have come to the end of November 2004 and no such valuation seem to be in sight. And, the fresh scheme in this current application was only proposed on 15 October 2004 towards the end of the 4th extension of the RO, and without any explanation as to the withdrawal of the 'public listed company' from the proposed scheme.

Even until now the applicants could only state that only 48.52% of the creditors have agreed to the application for extension and only 'some' creditors to the proposed scheme itself whereas s. 176(10A) requires approval of at least 50% in value of creditors before the court could grant a restraining order. In my view, this shows the unfeasibility of the draft October 2004 Proposed Scheme and it is bound to fail, *a fortiori*, considering that Encik Arif has now clarified that 'some' creditors meant only 21% in value of creditors. For all the above reasons I find that the applicants have not met the conditions in 10A and I am convinced that the applicants would not be in the position to produce a scheme of compromise or arrangement that is viable, reasonable or feasible even if their fifth application to extend the life of the RO to 21 February 2005 is granted.

In the event, I am constrained to, which I now do dismiss the applicants' application for extension of the RO under encl. 82 with costs. However, the applicants shall have liberty to apply for a fresh restraining order should they at any time hereafter be in the position to present a *bona fide* viable or feasible scheme of compromise, provided that such fresh application is served on the present respondents and interveners.

In view of the above factual matrix that are adverse to the applicants, and the various unsettling features of this case my hands are tied, though I am sympathetic to their plight in not being able to make even modest progress towards securing one (or several joint) white knights, or in achieving a feasible scheme of arrangement, despite a lapse of 25 months after having secured an order to restrain so many restless creditors to the tune of an aggregate debt value of over RM1.6 billion. Thus, at any time hereafter, should the applicants be, in the position to demonstrate that they are in a position to present a viable scheme of arrangement for ready approval by a majority of scheme creditors within a reasonable and ascertainable time, I am ready and willing to hear their fresh application, upon a Certificate of Urgency, even during the court vacation this December. I make no order on prayer 4 of Lampiran 111 as it may affect third party rights on transactions if any, when the RO prevailed without any objections from any quarter.